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Supreme Court of the United States

OCTOBER TERM, 1949

No.....

CAROLYN H. KING, *Feme Sole*, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE SUPREME COURT OF
THE UNITED STATES:

Carolyn H. King, feme sole, petitioner here, prays that writ of certiorari issue to review the judgment entered, in this case, on the 14th day of December, A. D. 1949, by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The District Court did not write an opinion.

The opinion of the Court of Appeals is not yet reported in the Federal Reporter, but a copy thereof is attached hereto.

JURISDICTION

The judgment of the court of appeals was entered on the 14th day of December, A. D. 1949 and petitioner's motion for rehearing was overruled January 9, 1950. The jurisdiction of this court is invoked under Section 1254(1) of title 28 of the U. S. Code entitled "Judicial Code and Judiciary", Act approved June 28, 1948, effective September 1, 1948. The court of appeals here has decided an important question of federal law which has not been, but should be, settled by this court.

QUESTION PRESENTED

The exact question presented by the opinion and record is:

Whether, under the Federal Tort Claims Act, controlling effect should be given to constructive knowledge and notice upon the part of the United States arising from a condition solely created and maintained by the United States, over the negative fact that respondent did not have actual knowledge or notice that its student flyer was about to take or was in the act of taking its training plane to fly; that is to say, whether the knowledge and notice arising from the facts that respondent was in the business of training young men to fly its planes; that it kept its training planes parked and filled with gasoline, unguarded and ready for immediate use; that it knew its student flyers, being young, were inclined to daring and reckless acts, such as taking without authority or contrary to rules a parked unguarded training plane and flying the same—were facts sufficient to outweigh the ordinary legal effect of the negative facts mentioned.

STATUTES INVOLVED

Section 2671 and 1346(b) and 2674 each of Title 28 of the U. S. Code entitled "Judicial Code and Judiciary", Act approved June 28, 1948, effective September 1, 1948.

STATEMENT

Petitioner alleged ownership of a house and the contents, the homestead of petitioner and her then living husband, on the occasion of the destruction thereof (R. pages 2-3); that on or about July 11, 1948, said residence and contents were totally destroyed by fire, directly or proximately caused by the negligence and wrongful acts and omissions of respondent's officers and employees while acting within the scope of their office and employment (R page 3); that prior to July 11, 1948, respondent operated United States Air Force and maintained a large Air Force Base at Randolph Field in close proximity to the City of San Antonio (R page 4); that student flyer White, on the occasion of taking said airplane, was under the influence of liquor, and serious acts of negligence are charged, such as that said White flew low over the City of San Antonio (pages 4-5), that appellee negligently failed to have the control tower on the west side of the airfield in operation at the time (R page 7), that respondent's officers and employees were on notice and/or were charged with notice of the imminent danger and hazard to the public from and on account of some persons, especially young cadets under the influence of liquor, taking one of said planes and flying it off from said base and over and on the City of San Antonio, and were charged with the duty of guarding said plane so that no person at any time could take one of said planes from said field unless authorized by competent authorities so to do (R page 8); that respondent well knew and was fully apprised of the high degree of care and dili-

gence required to prevent the unauthorized taking of any plane from said field, and especially by young cadets under the influence of liquor, and by the exercise of care and diligence could have prevented the taking of said plane by said Cadet White and prevented the accident in question (R pages 8-9), and that Captain Trudel, Provost Marshal, and the officers and enlisted men employees under his command and on duty as guards and/or police patrols between eleven o'clock p. m. July 10 and twelve-thirty o'clock a. m. July 11, 1948 whose names and respective ranks are unknown to petitioner were guilty of gross negligence in that no competent guard or police patrol examined or inspected line No. 11 on the West side of Randolph Field, the line on which the offending plane was placed, at any time from and after twelve o'clock p. m. July 10, 1948 to several hours after eight o'clock p. m. on July 11, 1948, and that said acts and ommissions severally were a proximate cause of the damage and injuries suffered (R pages 8, 9, 56, 57.) Other acts of negligence are alleged (R pages 69, 70, 71, 72), among which were that respondent's training plane was taken around midnight Saturday, July 10th, 1948, by respondent's student flyer White, from the place where said training plane was based, and that said plane was operated over a part of the nearby City of San Antonio and crashed into a house, resulting in the setting of fire to houses in one of which a civilian occupant was burned to death and the property of citizens injured. Petitioner further alleged that such training planes were then and there kept by respondent supplied with gasoline and ready for immediate use, and among other acts of negligence, alleged no guards were stationed by respondent at the very place where said planes were based (R pages 69, 70, 71). The respondent showed by its pleading and exhibits that it had a system of motor patrol at the Air Force Base (R pages 49-51) ; that said motor patrol patrolled at intervals of time the perimiter of the Air Force Base. Also, by

affidavit of respondent it is disclosed that such system of motor patrol on the occasion in question did not work, in that the motor patrol in leaving its station was recalled to the station on account of trouble which had started there. (R page 49).

Summary judgment was entered, and therein the trial court expresses the opinion that because the operation by Cadet White of respondent's plane was without its consent or knowledge, that no liability attached to respondent, and that there was no genuine issue of material fact in respect of other issues alleged, and the motion for summary judgment is granted and plaintiff adjudged to take nothing. (R pages 92-91).

REASONS FOR GRANTING THE WRIT

1. The Federal Tort Claims Act makes the United States liable for torts in the same manner and to the same extent as a private individual under like circumstances in accordance with law of the particular state.

2. Whether under the Torts Claims Act, where the United States in the operation of an Air Force Base is conducting a school to teach and qualify youths to fly airplanes, is guilty of negligence by reason of the fact that it keeps its training planes with tanks filled with gasoline and ready for immediate use, but fails to have guards stationed at the very place where such training planes are parked to effectually prevent any unauthorized use thereof by any student flyer,—is involved here.

3. The Federal Tort Claims legislation is new. It is important that a decision, not yet made by this court, be rendered on the subject whether or not the United States, though not having actual knowledge or notice of the fact that one of its student flyers is about to take or is in the act of taking a training plane off the field without its con-

sent, may yet escape liability when it has in effect appealed to the known spirit of recklessness and daring in its youthful student flyers by leaving its training planes gasoline filled ready for immediate take-off but without having any guards stationed at the place where parked to prevent any, and thereby has impliedly invited an, unauthorized taking thereof; especially when it could have removed all possibility of any unauthorized take-off into the air by draining all gasoline from the planes when not in scheduled use.

WHEREFORE, petitioner prays that his petition for writ of certiorari from this court to the court of appeals for the fifth circuit be granted.

And accompanying this petition, in support thereof, is petitioner's brief.

GUS B. MAUERMANN,
Gunter Building,
San Antonio 5, Texas.

W. B. (JACK) BALL,
Frost Bank Building,
San Antonio 5, Texas.

R. G. HARRIS,
405 South Texas Building,
San Antonio 5, Texas.

BEN F. FOSTER,
405 South Texas Building,
San Antonio 5, Texas.
Attorneys for Petitioner.

Brief for Petitioner

In Support of the Foregoing Petition For Writ of Certiorari

Now comes the petitioner in the cause styled and numbered in the foregoing petition for writ of certiorari, and now here presents her brief in support of said petition.

GROUNDS OF JURISDICTION

The judgment of the trial court was affirmed by the court of appeals by its judgment entered December 14, 1949 (R 102). Petitioner's motion for a rehearing was overruled by said court of appeals on the 9th day of January, 1950 (R 106).

The jurisdiction of the supreme court is invoked under Section 1254(1) of Title 28 of the U. S. Code, entitled "Judicial Code and Judiciary," approved June 28, 1948, effective September 1, 1948.

OPINION

The district court wrote no opinion.

The court of appeals wrote one opinion dated December 14, 1949; a copy is attached hereto. Such opinion has not yet been reported.

ASSIGNMENTS OF ERROR IN COURT OF APPEALS

FIRST ASSIGNMENT OF ERROR

"The trial court erred in granting motion for summary judgment and thereupon decreeing that Appellant take nothing."

SECOND ASSIGNMENT OF ERROR

"The trial court erred in granting motion for summary judgment and thereupon decreeing that Appellant take nothing, for this: The trial court's opinion that the operation of Appellee's airplane by student flyer White because without the consent or knowledge of Appellee rendered other facts alleged immaterial to show liability in Appellee, is an erroneous conclusion of law."

THIRD ASSIGNMENT OF ERROR

"The trial court erred in granting motion for summary judgment and thereupon decreeing that Appellant take nothing, for this: The construction by the trial court of the Federal Tort Claims Act, which makes Appellee's liability here depend solely upon its consent to operate and/or its knowledge of the operating by a student flyer of a plane, ignores the broad coverage expressed in said Act and the intent of Congress therein by denying liability in one of the situations alleged by Appellant, that is to say, the allegations that Appellee knew the danger to the citizens of the nearby City of San Antonio of any unsupervised operation by a student flyer of a training plane, yet, so knowing, kept such planes supplied with gasoline and ready for immediate use, but unguarded by any guards stationed at the very place where the training planes were based, and that such negligent omission was by superior military officer acting in line of duty and constituted a proximate cause of the student flyer's act of making an unauthorized use of the training plane resulting in damage to the property of Appellant."

FOURTH ASSIGNMENT OF ERROR

"The trial court erred in granting motion for summary judgment and thereupon decreeing that Appellant take nothing, for this: The construction by the trial court of the Federal Tort Claims Act, which makes Appellee's liability here depend solely upon its consent to operate and/or its knowledge of the operating by a student flyer of a plane, ignores the broad coverage expressed in said Act and the intent of Congress therein by denying liability for alleged negligent acts and negligent omissions of members of the military in line of duty, each alleged to be a proximate cause of the student flyer's operation of the Appellee's training plane, since, whether any alleged negligent act or negligent omission were a proximate cause of the student flyer's operation of Appellee's training plane and the resulting damage to citizens of the City of San Antonio, would constitute an issue of fact—a material issue of fact."

In the motion for rehearing in the court of appeals the following assignment of error was made:

"The court erred in affirming the judgment of the district court upon the holding that the United States was not liable for the consequences of taking and flying of the plane by Cadet White because such taking and flying of the plane was without the knowledge or consent of the United States."

QUESTION PRESENTED

Whether, under the Federal Tort Claims Act, controlling effect should be given to *constructive* knowedge and notice upon the part of the United States arising from a condition solely created and maintained by the U. S. Government over the negative fact that respondent did not have knowledge or notice that its student flyer was about to take

or was in the act of taking its training plane to fly; that is to say, whether the knowledge and notice arising from the facts that respondent was in the business of training young men to fly its planes; that it kept its training planes parked and filled with gasoline unguarded and ready for immediate use; that it knew its student flyers, being young, were inclined to daring and reckless acts, such as taking without authority or contrary to rules a parked unguarded plane and flying the same—were facts sufficient to outweigh the ordinary legal effect of the negative facts mentioned.

STATUTES INVOLVED

Section 2671 of Title 28 of the U. S. Code entitled "Judicial Code and Judiciary," Act approved June 28, 1948, effective September 1, 1948, reads as follows:

"As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Employee of the Government' includes * * * members of the military or naval forces of the United States * * * 'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Section 1346(b) of Title 28 of the U. S. Code entitled "Judicial Code and Judiciary", Act approved June 28, 1948, effective September 1, 1948, reads as follows:

"(b) Subject to the provisions of Chapter 173 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person,

would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674 of Title 28 of the U. S. Code entitled "Judicial Code and Judiciary", Act approved June 28, 1948, effective September 1, 1948, reads as follows:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *."

STATEMENT

Petitioner alleged ownership of the house and contents, the homestead of petitioner and her then living husband, on the occasion of the destruction thereof (R pages 2-3); that on or about July 11, 1948, said residence and contents were totally destroyed by fire, directly or proximately caused by the negligent and wrongful acts and omissions of respondent's officers and employees while acting within the scope of their office and employment (R page 3); that prior to July 11, 1948, respondent operated United States Air Force and maintained a large Air Force Base at Randolph Field in close proximity to the City of San Antonio (R page 4); that student flyer White, on the occasion of taking said airplane, was under the influence of liquor, and serious acts of negligence are charged, such as that White flew low over the City of San Antonio (R pages 4-5), that appellee negligently failed to have the control tower on the West side of the airfield in operation at the time (R page 7), that respondent's officers and employees were on notice and/or were charged with notice of the imminent danger and hazard to the public from and on account of some persons especially young cadets under the influence of liquor taking one of said planes and flying it off from said base and over and on the City of San An-

tonio, and were charged with the duty of guarding said planes so that no person at any time could take one of said planes from said field unless authorized by competent authorities so to do (R page 8); that respondent well knew and was fully apprised of the high degree of care and diligence required to prevent unauthorized taking of any plane from said field, and especially by young cadets under the influence of liquor, and by the exercise of care and diligence required could have prevented the taking of said plane by Cadet White and prevented the accident in question (R pages 8-9), and that Captain Trudel, Provost Marshal, and the officers and enlisted men employees under his command and on duty as guards and/or as police patrols between eleven o'clock p. m. July 10 and twelve thirty o'clock a. m. July 11, 1948 whose names and respective ranks are unknown to petitioner were guilty of gross negligence in that no competent guard or police patrol examined or inspected line No. 11 on the West side of Randolph Field, the line on which the offending plane was placed, at any time from and after twelve o'clock p. m. July 10, 1948 to several hours after eight o'clock p. m. on July 11, 1948, and that said acts and omissions severally were a proximate cause of the damage and injuries suffered (R pages 8, 9, 56, 57). Other acts of negligence are alleged (R pages 69, 70, 71, 72), among which were that respondent's training plane was taken around midnight Saturday, July 10th, 1948, by respondent's student flyer White, from the place from where said training plane was based, and that said plane was operated over a part of the nearby City of San Antonio and crashed into a house, resulting in the setting of fire to houses in which a civilian occupant was burned to death and the property of citizens injured. Petitioner further alleged that such training planes were then and there kept by respondent supplied with gasoline and ready for immediate use, and among

other acts of negligence, alleged no guards were stationed by respondent at the very place where said planes were based. (R pages 69, 70, 71). The respondent showed by its pleading and exhibits that it had a system of motor patrol at the Air Force Base (R pages 49-51); that said motor patrol patrolled at intervals of time the perimeter of the Air Force Base. Also, by affidavit of respondent it is disclosed that such system of motor patrol on the occasion in question did not work, in that the motor patrol in leaving its station was recalled to the station on account of trouble which had started there. (R page 49).

Summary judgment was entered, and therein the trial court expresses the opinion that because the operation by Cadet White of respondent's plane was without its consent or knowledge, that no liability attached to respondent, and that there was no genuine issue of material fact in respect of other issues alleged, and the motion for summary judgment is granted and the plaintiff adjudged to take nothing. (R pages 92-91).

ARGUMENT

Petitioner pleaded, in substance, knowledge and notice from the condition solely created and maintained by respondent, and therefore its consent to the taking and flying of the plane by student flyer White; that is, such knowledge and consent arose from the parking of its training planes, gasoline filled, ready for immediate take-off, unguarded by guards stationed at the very places where such planes were parked, knowing that the young men it was training in flying, because of their youth reckless and daring, were susceptible to the open invitation and inducement therefrom to take and fly the planes so unguarded without having authority for or giving notice thereof to any superior officer or employee of respondent.

Respondent knew that a training plane in the hands of an inexperienced student flyer is a dangerous instrumentality. It knew its student flyers were inexperienced. The condition thus created and maintained by respondent constructively charged it with notice that the training panes kept ready for immediate use, might be taken without notice to it or knowledge of such taking. The constructive notice and knowledge that respondent had from the condition it itself created and maintained with the necessary knowledge and notice of the ordinary and natural consequences flowing from the condition so created and maintained, petitioner contends was sufficient to make inapplicable the rule applied by the lower courts here.

Petitioner has found no case directly in point on the question whether the constructive knowledge mentioned would overcome the lack of actual knowledge or be notice to it that the student flyer White was about to take or was in the act of taking, without authority, the training plane on the flight in question which resulted in the catastrophe shown by the record, and the consequent damages to various property owners.

The court of appeals for the second circuit in *Spelar vs. United States*, 179 F. second 208, at page 209 states the court's condemnation of a "niggardly" construction of the Federal Tort Claims Act.

It will not do to say, it seems to us, that because respondent had no actual knowledge or notice that student flyer White intended to take or was about to take or was in the act of taking the training plane he did take to fly into the air, it would not be liable here. It could not close its eyes to the ordinary and natural consequences arising from the manner it which it kept its training planes and the disposition of its young student flyers. It had knowledge or notice from these that an unauthorized taking and

flying of a training airplane might reasonably occur and that such plane in the hands of an inexperienced student flyer could reasonably cause death to person and damage to property in the nearby City of San Antonio. This would be knowledge and notice constructively charged upon respondent, and it would seem that respondent should be held liable here under the Federal Tort Claims Act and in accordance with the rule that the employer who, while knowing his employee to be inexperienced in operating an automobile, permits him to operate the same and is held liable for negligent operation which results in injury to a third person's property or person.

WHEREFORE, petitioner prays that this court grant her petition for a writ of certiorari from this court to the court of appeals for the fifth circuit, and that upon consideration thereof after granting, the judgment of the said court of appeals affirming the judgment of the trial court, together with the judgment of the trial court, severally to be set aside, and that this court render judgment that the cause be remanded to the trial court for re-trial upon evidence to be taken.

GUS B. MAUERMANN,
Gunter Building,
San Antonio 5, Texas.
W. B. (JACK) BALL,
Frost Bank Building,
San Antonio 5, Texas.
R. G. HARRIS,
405 South Texas Building,
San Antonio 5, Texas.

Ben F. Foster

BEN F. FOSTER,
405 South Texas Building,
San Antonio 5, Texas.
Attorneys for Petitioner.

OPPOSITION

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 720

CAROLYN H. KING, FEME SOLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion embodied in the order for summary judgment of the United States District Court for the Western District of Texas (R. 88-92) is not reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 97-100) is reported at 178 F. 2d 320.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 14, 1949 (R. 100). A petition for rehearing was denied on January 9, 1950 (R. 102). The petition for a writ

of certiorari was filed on March 29, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether both courts below erred in refusing to hold the United States liable, under the Federal Tort Claims Act, for damages caused by the negligent operation of an airplane owned by it, where the plane was taken and operated by an Army Air Force cadet without the knowledge, consent, or authorization of the United States.

STATUTE INVOLVED

The pertinent provisions of the Federal Tort Claims Act are set forth in the Appendix, *infra*, pp. 9-10.[1]

STATEMENT

On July 11, 1948, cadet White, member of an Army Air Force training group stationed at Randolph Field, Texas, left the base and became intoxicated (R. 98, 99). He returned shortly after midnight and, while still under the influence of

[1] The Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. 921 *et seq.*) was repealed, and its provisions were revised and reenacted into law as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, 62 Stat. 672, effective September 1, 1948. Section 39 of the repealing act provides that existing rights and liabilities shall not be affected by the repeal. Since the case at bar arose prior to the repeal, it appears that any rights which petitioner may have against the United States herein, are governed by the Federal Tort Claims Act as it existed at the time of the repeal. It is the former provisions of the Act, therefore, which are set out in the Appendix, *infra*, pp. 9-10.

alcohol, took off in one of the training planes parked on the field, without the knowledge of the military police on patrol or the officers on duty, and without the knowledge or consent of the Director of Flying Training, the officer whose authorization was necessary to any flight made by a cadet (R. 98, 99). While flying the plane quite low over the city of San Antonio, the cadet crashed it into petitioner's home, destroying the house and its contents (R. 98).

On February 12, 1949, petitioner brought suit against the United States in the United States District Court for the Western District of Texas, under the Federal Tort Claims Act, for damages in the amount of $352.30 (R. 68-73). In her amended complaint, petitioner sought damages in the sum of $25,178.67 and alleged, *inter alia,* that the flight was made by the cadet while acting in line of duty; that the Army officers and employees were negligent in leaving a plane, parked and filled with gasoline, unguarded since they knew or should have known that such a plane constituted a public menace and an open invitation to a person so inclined, and especially a cadet under the influence of liquor, to take without authorization (R. 2-9). The district court was of the opinion that the United States was under no liability since it was undisputed that the cadet was operating the plane without the Government's consent or knowledge, and accordingly granted the Government's motion for summary judgment (R. 88-92). The

Court of Appeals for the Fifth Circuit, finding that the decision below was, in accordance with the provisions of the Federal Tort Claims Act, based on and was in consonance with the law of the place of the accident, affirmed (R. 97-100). It observed (R. 99) that the United States was not liable, as principal, for the wrongful actions of the cadet since they were not committed, as required by the Act, while he was acting in line of duty; nor was the Government liable as the negligent owner of a dangerous instrumentality since the plane was taken without its consent, knowledge, or authorization.

ARGUMENT

The issue presented in this case is whether the United States can be held liable, as owner of an airplane, for damages resulting from the negligent operation of the plane by an Air Force cadet, where such operation was without its consent or knowledge. The record in this case makes it abundantly clear that the actions of the cadet were not performed in line of duty, and that the flight was without the consent or knowledge of the United States. We submit, accordingly, that the decisions below refusing to impose liability are plainly correct and that review by this Court is not warranted.

It is well settled that the owner of a motor vehicle is not liable under the principle of respondeat superior for damages resulting from the negligent operation of the vehicle by his employee while the latter is using it for his own purposes

without the owner's permission or consent. *E. g.*, see *Department of Water and Power* v. *Anderson*, 95 F. 2d 577 (C. A. 9), certiorari denied, 305 U. S. 607; *Peabody* v. *Marlboro Implement Co.*, 72 F. 2d 81 (C. A. D. C.), certiorari denied, 293 U. S. 601; *Nicholson* v. *Houston Electric Co.*, Tex. Civ. App., 220 S. W. 632.[2] Apparently aware of this, petitioner does not contend that this is a case where the United States has assumed liability, as principal, for a tort committed by a member of its armed forces acting in line of duty.[3] Instead, petitioner's approach to liability on the part of the United States is based on the theory that the Government was negligent as the owner of a dangerous instrumentality. Petitioner's sole argument to this Court is that the authorities at Randolph Field, by leaving a plane unguarded and filled with gasoline, constructively entrusted it to the cadet, that the Government, therefore, should be held liable "in accordance with the rule that the employer who, while knowing his employee to be inexperienced in operating an automobile, permits him to operate the same and is held liable for negligent operation which results in injury to a third person's property or person" (Pet. 15). Peti-

[2] It was assumed by the court below in this case, and we see no reason to question the assumption, that the principles of law applicable to the operation of motor vehicles should apply to the operation of airplanes.

[3] Petitioner could hardly do so, since admittedly the flight was without the consent or knowledge of the Government and since the cadet, as the court below observed (R. 99), "was on a frolic of his own."

tioner, however, misconceives the theory of liability under this principle of tort law. Liability on the part of the owner or employer, under the rule relied on by petitioner, is predicated upon the owner's negligence (a) in entrusting the automobile to a third person (b) knowing him to be reckless or incompetent. See *Murray* v. *Pasotex Pipe Line Co.*, 161 F. 2d 5 (C. A. 5); *Seinsheimer* v. *Burkhart*, 132 Tex. 336, 122 S. W. 2d 1063; *Department of Water and Power* v. *Anderson, supra*, p. 582. Here, there was no actual delivery of the plane to the cadet. Nor is respondent aware of any case adopting petitioner's novel contention that the owner of an airplane or a motor vehicle who leaves it unguarded and ready for use impliedly consents to its unauthorized use, since the owner knows or should know that leaving it thus constitutes an open invitation to an unauthorized taking. Certainly, under Texas law there is no constructive delivery in the situation here presented, for the Government "could hardly be required to anticipate that [the cadet] would take possession of the [plane] wholly without authority and that he would operate it * * * while he was in a state of intoxication in violation of the law." *Clem Lumber Co.* v. *Fisher*, Tex. Civ. App., 84 S. W. 2d 282, 284. Even assuming the Government's consent to the taking of the plane, petitioner's contention must fail, since the authorities at the field were unaware that at the time of the flight the cadet was incompetent as a result of intoxication. See *R. J. Reynolds Tobacco*

Co. v. *Newby,* 145 F. 2d 768 (C. A. 9); *Clem Lumber Co.* v. *Fisher, supra;* 2 *Texas Jurisprudence* 230 (Ten Year Supp. 1937-1947). Nor is knowledge that the cadet might become intoxicated, take the plane and fly it recklessly imputable to the Government since there is no evidence that the cadet had done so in the past or that these facts were known to the Government. See *Murray* v. *Pasotex Pipe Line Co., supra; Department of Water and Power* v. *Anderson, supra.*

Thus, neither condition of liability required by the rule relied on by petitioner is present here. Petitioner's argument, which is devoid of merit, is but another attempt to subject the United States to liability for the negligent operation of a potentially dangerous instrumentality, merely by virtue of the fact that the Government is the owner of the instrumentality. The courts have consistently held, however, that the bare fact of federal ownership of an instrumentality causing damage is insufficient to impose liability on the United States under the Federal Tort Claims Act. *E. g.,* see *Fries* v. *United States,* 170 F. 2d 726 (C. A. 6), certiorari denied, 336 U. S. 954; *Cropper* v. *United States,* 81 F. Supp. 81 (N. D. Fla.); *Long* v. *United States,* 78 F. Supp. 35 (S. D. Cal.). An opposite result would make the Government an insurer for every whim of one of its employees and would subject it "to fantastic claims of liability having no relation to the doctrine of respondeat superior, as it is known and applied, in determining the liability of private persons."

United States v. *Campbell,* 172 F. 2d 500, 503 (C. A. 5), certiorari denied, 337 U. S. 957.

CONCLUSION

The decision of the court below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
SAMUEL D. SLADE,
RICHARD P. WILLIAMS, III,
Attorneys.

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APPENDIX

The pertinent provisions of the Federal Tort Claims Act (60 Stat. 842, 28 U. S. C. 931, 941), provided as follows:

SEC. 402. As used in this title, the term—

* * * * *

(b) "Employee of the Government" includes officers or employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

(c) "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within

the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

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